U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 30 December 2004

CASE NO.: 2004-BLA-5095

In the Matter of

HARVEY FARLEY,
Claimant

v.

HEARTLAND COAL CO.,
Employer

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND
Carrier

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Leonard J. Stayton, Esq.,
For the Claimant

Robert Weinberger, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a miner's claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on October 1, 2002. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,

3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his claim for benefits on October 1, 2002. (Director's Exhibit ("DX") 2).[1] The claim was denied by the district director because the evidence failed to establish all the elements of entitlement. (DX 20). On July 15 2003, the claimant requested a hearing before an administrative law judge. (DX 22). On October 16, 2003, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program (OWCP) for a formal hearing. (DX). I was assigned the case on February 27, 2004.

On August 3, 2004, I held a hearing in Charleston, West Virginia, at which the claimant, employer, and insurer were represented by counsel.[2] No appearance was entered for the Director, Office of Workman Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-5, Director's exhibits ("DX") 1-27, and Employer's exhibit ("EX") 1 were admitted into the record.

Post-hearing arguments were received on September 20, 2004.

ISSUES[3]

I. Whether the miner is totally disabled?

II. Whether the miner's disability is due to pneumoconiosis?

[1] Mr. Farley's 1/22/99 claim was withdrawn on 5/8/01.

[2] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(*en banc*), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Under *Kopp v. Director, OWCP*, 877 f.2D 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

[3] The issues were narrowed in the insurer's pre-hearing submission and at the hearing. (TR 5-6).

FINDINGS OF FACT

I. Background

A. Coal Miner

The parties stipulated and I find the claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least 18 years. (Hearing Transcript (TR) 5, 9; DX 2, 4).

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on October 1, 2002. (DX 2). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator

Heartland Coal Company is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F (Subpart G for claims filed on or after Jan. 19, 2001[4], Part 725 of the Regulations.[5]

D. Dependents

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife, Naomi. (DX 2, 8).

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[4] § 725.495 criteria for determining a responsible operator. (Applicable to claims filed on or after Jan. 19, 2001).

"(a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the "responsible operator") shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner…(b) It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e)…

[5] 20 C.F.R. § 725.492. The terms "operator" and "responsible operator" are defined in 20 C.F.R. §§ 725.491 and 725.492. The regulations provide two rebuttable presumptions to support a finding the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust; and (2) a presumption that the miner's pneumoconiosis **(disability or death and not pneumoconiosis for claims filed on or after Jan. 19, 2001)** arose out of his employment with the operator. 20 C.F.R. §§ 725.492(c) and 725.493(a)(6) (§§ 725.491(d) and 725.494(a) for claims filed on or after Jan. 19, 2001). To rebut the first, the employer must establish that there were no significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984); *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). To rebut the second, the operator must prove "within reasonable medical certainty or at least probability by means of fact and/or expert opinion based thereon that the claimant's exposure to coal dust in his operation, at whatever level, did not result in, or contribute to, the disease." *Zamski v. Consolidation Coal Co.,* 2 B.L.R. 1-1005 (1980). Neither, presumption has been rebutted in this case.

E. Personal, Employment and Smoking History[6]

The claimant was born on July 29, 1943. (TR 9). He married Naomi Lambert, on January 3, 1966. (DX 2). The Claimant's last position in the coal mines was that of a continuous miner operator. (DX 4; TR 10). He worked in the coal mining industry until on or about February 21, 1996, when he was laid off. (TR 11, 16). He subsequently drove a cross-country truck for a period of time. (TR 11). Mr. Farley stopped driving due to his poor eyesight (glaucoma) and the fact he was barely able to pass a breathing test. (TR 12). He has not worked for wages since then. (TR 16). He was awarded 15% state disability for silicosis, five or six years ago. (TR 17).

The claimant, as part of his coal mining duties, was required to operate a continuous miner, lift cables, and move cars, pins and related items. (DX 2, 4; TR 9-10). The pins weighed around 40 pounds and he would have to lift as much as he could when moving cables. (TR 9-10).

There is evidence of record that the claimant's respiratory disability may be due, in part, to his history of cigarette smoking. He testified he began smoking at age 17 or 18 and continued to smoke less than a pack per day until treating with Dr. Twel, in 1999, then reduced it to half a pack per day through the date of the hearing. (TR 12-13, 19-20; EX 1). He testified that he did not smoke while actually working underground in the coal mines. (TR 20). Mr. Farley understated the number of years and overstated the amount he had been smoking in his response to interrogatories, but testified more consistently at the hearing. (EX 1). According to Dr. Zaldivar, his carboxyhemoglobin test results reflect that the miner may currently be a heavy two-pack per day smoker. Neither Dr. Baker nor Dr. Gaziano administered a carboxyhemoglobin test and neither considered the impact of such a high exposure. Based upon Dr. Zaldivar's opinion, I find Mr. Farley has grossly understated his current smoking.

II. Medical Evidence[7]

A. Chest X-rays

There were six readings of three X-rays, taken between 11/7/02 and 8/23/03. All six of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b).[8] All six are positive, by physicians who are either Board-certified in radiology and/or B-readers.[9]

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[6] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

[7] *Dempsey v. Sewell Coal Co. & Director, OWCP,* __ B.L.R. ____, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004). BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1).

[8] ILO-UICC/Cincinnati classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

[9] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Quality	ILO Classification	Interpretation Or Impression
CX 1	8/23/03 8/23/03	G. Baker	B, BCI(P)	1	½, s/t	Em, tb
CX 2	8/23/03 12/5/03	T. Miller	B, BCR	1	2/2, S/T ALL ZONES	Copd (em)
CX 3	3/26/03 10/28/03	T. Miller	B, BCR	2	½, q/t, all zones	Changes of severe COPD (em).
DX 12	3/26/03 4/13/03	G. Zaldivar	B	1	1/1, q/t	Em.
DX 11	11/7/02 11/7/02	D. Gaziano	B	1	2/1,A	
DX 13	11/7/02 3/11/03	J. Wiot	B, BCR	1	1/1, q/t	Not definitely CWP.
DX 11	11/7/02 11/22/02	Carl Binns?	B, BCR	1		Bu. Quality reading.

* A-A-reader; B-B-Reader; BCR – Board Certified Radiologist; BCP – Board-certified pulmonologist; BCI – Board-certified internal medicine; BCI(P) – Board-certified internal medicine with pulmonary medicine sub-specialty. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987), *Old Ben Coal Co. v. Battram,* 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993), and *Zeigler Co. v. Kelley*, 112 F.3d 839, 842-843 (7th Cir. 1997). B-readers need not be radiologists. *Cannelton Industries, Inc. v. Director, OWCP[Frye],* Case No. 03-1232 (4th Cir. April 5, 2004)(Proper to accord more weight to radiologists' readings over non-radiologists). *Bethenergy Mines, Inc., v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004)(Unpub.)(Appropriate to accord greater weight to the x-ray interpretation of a dually-qualified reader over a B-reader).

**The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category "0," including subcategories "0/-, 0/0, 0/1," does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp*., 6 B.L.R. 1-307 (1983) (Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997)(*en banc)(Unpublished)*. If no categories are chosen, in box 2B(c) of the X-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

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weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 f.3d 1273, 1276 n. 2 (7th Cir. 1993)."

B. Pulmonary Function Studies[10]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician **Date** **Exh.#**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Trac-ings**	**Compre-hension** **Cooper-ation**	**Qualify*** **Con-form****	**Dr.'s Impression**
Baker 8/23/03 CX 1	60 67"	1.48		3.46	yes	Good Fair	*No **Yes	Moderate obstructive defect.
Zaldivar 3/26/03 DX 12	59 67"	1.93 1.84		4.35 4.26	yes		*No **Yes *No **Yes	Moderate irreversible obstruction. Diffusion impairment. Air trapping. Very high carboxy-hemoglobin.
Gaziano 11/7/02 DX 11	59 67"	1.44	51	4.10	yes	Good Good	*Yes **Yes	Validated by Dr. Kucera (DX 10).

*A "**qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)). A judge may infer in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP,* 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

Appendix B (Effective Jan. 19, 2001) states "(2) the administration of pulmonary function tests shall conform to the following criteria: (i) Tests shall not be performed during or soon after an acute respiratory illness…"

Appendix B (Effective Jan. 19, 2001), (2)(ii)(G): Effort is deemed "unacceptable" when the subject "[H]as an excessive variability between the three acceptable curves. The variation between the two largest FEV_1'S of the three acceptable

[10] § 718.103(a)(Effective for tests conducted after Jan. 19, 2001 (See 718.101(b)), provides: "Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop)." 65 Fed. Reg. 80047 (Dec. 20, 2000). In the case of a deceased miner, where no pulmonary function test are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner. 20 C.F.R. § 718.103(c).

tracings should not exceed 5 percent of the largest FEV_1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve the degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test." (Emphasis added).

For a miner of the claimant's height of 67 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 1.84 for a male 60 years of age. If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.35 or an MVV equal to or less than 74; or a ratio equal to or less than 55% when the results of the FEV_1 tests are divided by the results of the FVC test. Qualifying values for ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	**Age**	**FEV_1**	**FVC**	**MVV**
67"	59	1.86	2.37	74
67"	60	1.84	2.35	74

C. Arterial Blood Gas Studies[11]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange.[12] This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

[11] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.

20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides: In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…

(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

[12] 20 C.F.R. § 718.105(d)(Applicable Jan. 19, 2001) states:

"If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death."

[(e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with paragraphs (a), (b), and (c), noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's death.]

Date Ex. #	Physician	PCO_2	PO_2	Qualify	Physician Impression
8/23/03 CX 1	Baker	41	79	No	Degenerative joint disease
3/26/03 DX 12	Zaldivar	40	79	No	
11/7/02 DX 11	Gaziano	36 44	78 64	No No	

*Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

Appendix C to Part 718 (Effective Jan. 19, 2001) states: "Tests shall not be performed during or soon after an acute respiratory or cardiac illness."

D. Physicians' Reports[13]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Domenic Gaziano, is a B-reader and is Board-certified in internal medicine with a subspecialty in pulmonary medicine. His form report, based upon his examination of the claimant, on November 7, 2002, notes 20-plus years of coal mine employment and a 47 pack-year smoking history. (DX 11). Based on non-qualifying arterial blood gases, a qualifying pulmonary function study, and a positive (2/1 A) chest X-ray, Dr. Gaziano diagnosed coal workers' pneumoconiosis due to coal dust exposure.

He opined that the claimant's pulmonary condition was related to his coal dust exposure. He found the claimant severely impaired and totally disabled. (DX 11). He did not discuss the impact, if any, of the miner's smoking.

Dr. George L. Zaldivar is a B-reader B-reader and is Board-certified in internal medicine with a subspecialty in pulmonary medicine. His report, based upon his second examination of

[13] *Dempsey v. Sewell Coal Co. & Director, OWCP,* __ B.L.R. ____, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004). Under (new) 2001 regulations, expert opinions must be based on admissible evidence.

the claimant, on 3/26/03, and a review of medical records, noted coal mine employment ending in 1996 and a current very high smoking habit. Based on a normal examination, a positive carboxyhemoglobin test, normal EKG, non-qualifying arterial blood gases, a qualifying pulmonary function study, and a positive chest X-ray, Dr. Zaldivar diagnosed CWP from coal mine dust exposure and emphysema. Although he did not find total respiratory disability, Dr. Zaldivar diagnosed a moderate to severe pulmonary impairment from emphysema primarily caused by smoking, but with a "small contribution by his coal mining work which has resulted in retention of coal dust in his lungs." (DX 12).

Dr. Glen Baker, is a B-reader and is Board-certified in internal medicine with a subspecialty in pulmonary medicine . (CX 1). His form report, based upon his examination of the claimant, on 8/23/03, notes a 20-some-year history of coal mine employment and a long smoking history of one pack per day and currently ½ pack per day. (CX 1).

Based on exposure history, non-qualifying arterial blood gases, a non-qualifying pulmonary function study, and a positive (1/2) chest X-ray, Dr. Baker diagnosed CWP from coal dust exposure, COPD from coal dust exposure and smoking, bronchitis from coal dust exposure and smoking, minimal-mild arterial hypoxia from coal dust exposure and smoking, and a moderate obstructive ventilatory defect.

He opined that the claimant's pulmonary impairment from coal dust exposure and smoking condition was moderate. Yet he answered a form questionnaire checking a block reflecting the miner did not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. (DX 12).

III. Witness' Testimony

Mr. Farley first noticed breathing problems in about 1986 or 1987 when he "couldn't hardly breath getting up the hill (hunting)". (TR 21). He testified that Dr. Twill has treated him for lung problems for four to five years. (TR 14). He prescribed Advair which seemed to help his breathing. (TR 14). Mr. Farley has weakness in his legs, perhaps arthritis. He testified he could walk the length of a football field before he would have to stop and take a break. (TR 15). He can stand an hour, at the most, and could lift 30-40 pounds. He mows his yard with a riding mower and gave up hunting because of his health. (TR 16). He has not been hospitalized for breathing problems. (TR 22). He did not have problems doing his truck driving job due to breathing because "all I had to do was sit under a wheel and drive the truck." (TR 23).

IV. Other

Mr. Farley was awarded 15% disability, in 1996, by the state for chronic lung disease or pneumoconiosis. (DX 7).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of

the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). [*See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997)]. [*Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989).] The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cr. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*,338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[14] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[15]

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or

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[14] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act.

[15] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

substantially aggravated by, dust exposure in coal mine employment."[16] Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

"…[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing, Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[17] 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal co. v. Williams,* 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

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[16] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases …attain the status of an "impairment" to be so classified. The definition is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure. *See, e.g., Warth*, 60 F.3d at 175." *Clinchfield Coal v. Fuller*, 180 F.3d 622 (4th Cir. June 25, 1999) at 625.

[17] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel,* 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim field after January 1, 1982, with no convincing evidence of complicated pneumoconiosis, as discussed in further detail below.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray. 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical pinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[18] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). Because of their various Board-certifications, B-reader status, and expertise, as noted above, I rank Drs. Baker, Zaldivar, and Gaziano equally.

As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); and, *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979).[19] This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

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[18] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp.*, 6 B.L.R. 1-1291 (1984)…" In *Cornett v. Benham Coal, Inc.,* 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000), the court held if a physician bases a finding of CWP only upon the miner's history of coal dust exposure and a positive X-ray, then the opinion should not count as a reasoned medical opinion, under 20 C.F.R. § 718.202(a)(4). (It also rejected Dr. Fino's opinion that the miner's affliction was due solely to smoking and not coal dust exposure because the PFS were not consistent with fibrosis, as would be expected in simple CWP. Fibrosis, while an element of medical CWP, is not a required element of legal CWP).

[19] *Cranor v. Peabody Coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon*. 22 B.L.R. 1-1 (Oct. 29, 1999)(*En Banc.*). In a case arising in the Sixth Circuit, the Board held it was proper for the judge to give greater weight to more recent evidence, as the Circuit has found CWP to be a "progressive and degenerative disease." *See also Abshire v. D & L Coal Co*. 22 B.L.R. 1-203 (2002), citing *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 B.L.R. 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 B.L.R. 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990); and, *Clark v. Karst-Robbin Coal Co*., 12 B.L.R. 10-149 (1989), the Board holds greater weight may be accorded to more recent X-ray evidence of record. In *Abshire*, the Board also recognized *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 B.L.R. 2-1 (1987) (CWP is a progressive disease).

Adkins v. Director, OWCP, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. 1992) is the rule in the Fourth Circuit. It holds it is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened. The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, inasmuch as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier…" *See also, Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 B.L.R. 2-16 (4th Cir. 1993).]

It is proper for an administrative law judge to accord greater weight to a physician who "integrated all of the objective evidence" more than contrary physicians of record, particularly where he considered tests results showing diffusion impairment, reversibility studies, and blood gas readings. *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004).

A general disability determination by a state or other agency, i.e., the 15% disability award here, is not binding on the Department of Labor with regard to a claim field under Part C, but the determination may be used as some evidence of disability or rejected as irrelevant at the discretion of the fact-finder.[20] *Schegan v. Waste Management & Processors, Inc.*, 18 B.L.R. 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984) (opinion by the West Virginia Occupational Pneumoconiosis Board of a "15% pulmonary functional impairment" is relevant to disability but not binding). *McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988). Thus, I give the state determination some weight as to the existence of pneumoconiosis.

The parties do not contest the existence of pneumoconiosis due to coal mine dust exposure. Moreover, despite Dr. Wiot's comment, I find all the X-ray readings are positive for the disease and all the physicians agree the miner suffers from CWP.

I find the claimant has met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment.[21] 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.[22] 20 C.F.R § 718.203(b).

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[20] See § 718.206 "Effect of findings by persons or agencies." (65 Fed. Reg. 80050, Dec. 20, 2000) (Effective Jan. 19, 2001). If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

[21] *Hutchens v. Director, OWCP*, 8 B.L.R. 1-16 (1985). Judge must consider a miner's non-coal mine employment in determining whether his pneumoconiosis "arose out of" coal mine employment.

[22] *Cranor v. Peabody coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon.* 22 B.L.R. 1-1 (Oct. 29, 1999)(*En Banc*). Judge did not err considering a physician's X-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." The doctor reported the category I pneumoconiosis found on X-ray was not CWP. The Board finds this comment "merely

Since the miner had ten years or more of coal mine employment, he receives the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. Nor does the record contain contrary evidence that establishes the claimant's pneumoconiosis arose out of alternative causes. Moreover, the employer does not contest this issue.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[23] Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony.[24] Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

Section 718.204(b)(2)(iii) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. Section 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miners' claim in the absence of medical or other relevant evidence.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. More weight may be accorded to the results of a recent ventilatory study over those of an earlier study. *Coleman v. Ramey Coal Co.,* 18 B.L.R. 1-9 (1993). The two most recent studies, conducted in 2003, reflect non-qualifying values. Dr. Gaziano's late 2002 PFS reflects a qualifying value. Because of its timing, I do not give it less weight solely based upon temporal considerations.

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addresses the source of the diagnosed pneumoconiosis" (and must be addressed under 20 C.F.R. § 718.203, "causation").

[23] The Board has held it is the claimant's burden to establish total disability due to CWP by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986)(en banc). 20 C.F.R. § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states:

(a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.

[24] In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). See 20 C.F.R. § 718.204(d)(5)(living miner's statements or testimony insufficient alone to establish total disability).

Although the PFS conducted by Dr. Baker was non-qualifying, he found a moderate impairment and checked a block on a form stating the miner did not have the respiratory capacity to return to coal mine employment, which could equate to total disability. Dr. Zaldivar found only a moderate obstructive respiratory impairment (consistent with his testing), as did Dr. Baker. Given the similarity of the two findings of obstructive respiratory impairment and Dr. Gaziano's opinion, supported by his PFS, I find the PFS's establish total respiratory disability.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b) (2)(ii). None of the AGS had qualifying values and thus alone do not establish total respiratory disability.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). Under this subsection, "…all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204.[25] The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP,* 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Dr. Gaziano found "A" type opacities on the 11/7/02 X-ray. Dr. Wiot, a more highly qualified, dual-qualified reader found no such opacities, nor did he find complicated CWP. None of the remaining X-rays suggest the presence of "A" type opacities. Thus, I do not find complicated CWP.

I find that the miner's last coal mining positions required heavy manual labor. Because the claimant's symptoms render him unable to walk short distances, stand for extended periods or lift heavy items, I find he is incapable of performing his prior coal mine employment. The employer's expert, Dr. Zaldivar, concluded the miner had a moderate to "severe" respiratory impairment. I find Dr. Zaldivar's opinion insufficient to prove the claimant is able to perform gainful and comparable work..

The Fourth Circuit rule is that "nonrespiratory and nonpulmonary impairments, such as the claimant's glaucoma, have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (4th Cir. 1994). In *Milburn Colliery Co. v. Director, OWCP, [Hicks]*, 21 B.L.R. 2-323, 138 F.3d 524 (4th Cir. Mar.

[25] Opinion that the miner should work in a dust-free environment does not constitute a total disability finding. *See White v. New White Coal Co*., 22 B.L.R. 1-___, BRB No. 03-0367 BLA (Jan. 22, 2004).

6, 1998) *citing Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the Court had "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments." Even if it is determined that claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems." *Id.* at 534. See *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004)(Upholding validity of 20 C.F.R. section 718.204(a)(2001)("any nonpulmonary or nonrespiratory condition or disease, which causes independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis.").

The Benefits Review Board has held that nonrespiratory and nonpulmonary impairments are irrelevant to establishing total disability, under 20 C.F.R. § 718.204. *Beatty v. Danri Corp.*, 16 B.L.R. 1-1 (1991).

I find the claimant has met his burden of proof in establishing the existence of total respiratory disability. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. Nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

E. Cause of total disability[26]

The revised regulations, 20 C.F.R. § 718.204(c)(1), requires a claimant establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability.[27] The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 799946 (Dec. 20, 2000).[28] That is the crux of this case.

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[26] *Billings v. Harlan #4 Coal Co.*, ___ B.L.R. __, BRB No. 94-3721 (June 19, 1997). The Board has held that the issues of total disability and causation are independent; therefore, administrative law judges need not reject a Doctor's opinion on causation simply because the doctor did not consider the claimant's respiratory impairment to be totally disabling.

[27] This standard is more consistent with the Third Circuit's pre-amendment "substantial contributor" standard set forth in *Bonessa v. U.S. Steel Corp*., 884 F.2d 726, 13 B.L.R. 2-23 (3d Cir. 1989) than the Fourth Circuit's "contributing cause" standard set forth in *Robinson v. Picklands Mather & Co./ Leslie Coal Co. v. Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35, 38 (4th Cir. 1990).

[28] Effective January 19, 2001, § 718.204(a) states, in pertinent part:

> For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

Under the pre-2001 regulations, the Board required that pneumoconiosis be a "contributing cause" of the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(*en banc)*, *overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

The Fourth Circuit Court of Appeals required, under the pre-2001 regulations, that pneumoconiosis be a "contributing cause" of the claimant's total disability.[29] *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respirator or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

The fact that a physician does not explain how he or she could distinguish between disability due to coal mining and cigarette smoking or refer to evidence which supports a total disability opinion, may make the opinion "unreasoned." *Gilliam v. G&O Coal Co.*, 7 B.L.R. 1-59 (1984). This is the case with the opinions of Drs. Gaziano and Baker, who, despite documenting their opinions by conducting objective testing, merely set forth conclusions on a form. Only Dr. Zaldivar provided a thoroughly "reasoned" medical opinion.

There is evidence of record that claimant's respiratory disability is due, in part, to his undisputed history of cigarette smoking.[30] However, to qualify for Black Lung benefits, the claimant need not prove that pneumoconiosis is the "sole" or "direct" cause of his respiratory disability, but rather, under the pre-2001 regulations, that it had contributed to his disability. *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition." *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) *citing generally, Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990).

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Picklands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).[31]

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[29] *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L..R 2-68 at 2-76, 914 F.2d 35 (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996) (Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or 'substantial' cause." *Id.*

[30] *Sewell Coal Co. v. Director, OWCP [O'Dell]* (Unpublished), 22 B.L.R. 2-213, No. 00-2253 (4th Cir. July 26, 2001)(Unpublished). "…the mere documentation of a smoking history on the official OWCP form or elsewhere, without more, cannot reasonably imply that an examining physician has 'addressed the possibility that cigarette smoking caused the claimant's disability." *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 at 371 (4th Cir. 1994).

[31] "By adopting the 'necessary condition' analysis of the Seventh Circuit in *Robinson*, we addressed those claim…in which pneumoconiosis has played only a *de minimis* part. *Robinson*, 914 F.2d at 38, n. 5." *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195 n. 8 (4th Cir. 1995).

Although not binding, the law of the Sixth Circuit is illuminating. Under the pre-2001, the Sixth Circuit Court of Appeals required that "total disability" be "due, at least in part, to pneumoconiosis." *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1989); *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 134 (6th Cir. 1993).[32] In *Peabody Coal Company v. Director, OWCP*, __ F.3d __, 21 B.L.R. 2-181 (6th Cir. Oct. 7, 1997), the Court reiterated the *Adams* standard, that the total disability be due "at least in part to CWP," but held when CWP plays only an infinitesimal or de minimis part in the respiratory disability it is not sufficient to establish "total disability" under section 901(a) of the Black Lung Act.

> A miner's disability simply cannot be said to be due to pneumoconiosis when the causation link is so tentative…Nevertheless, a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory disability. The miner's pneumoconiosis must be more than a merely speculative cause of his disability.[33]

In September 2001, the Sixth Circuit interpreted the amended provisions at 20 C.F.R. § 718.204(c), which provide that CWP is a "substantially contributing cause" to the miner's total disability if it, "(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." The Court found, under the new regulations, the fact that the miner's non-coal dust related respiratory disease, i.e., COPD from smoking, would have left him totally disabled even without exposure to coal dust, this would not preclude his entitlement to benefits, because he "may nonetheless possess a compensable injury if his pneumoconiosis 'materially worsens' this condition." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, ___ F.3d ___, Case No. 00-3316, 22 B.L.R. ___ (6th Cir. Sept. 6, 2001).

Dr. Zaldivar's report, is the best reasoned opinion and the sole one supported by a carboxyhemoglobin test. He attributes the miner's respiratory impairment to a combination of exposure to coal mine dust and very heavy cigarette smoking. He found only a small contribution by CWP. In contrast, the reports of Drs. Baker and Gaziano are largely unreasoned. Moreover, they lacked the benefit of having the results of the carboxyhemoglobin test. The claimant's evidence does not support a finding that CWP was a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability. The evidence establishes CWP was merely a negligible, inconsequential, or insignificant contribution to the miner's total disability. As an aside, I find it did not materially worsen his condition.

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[32] *McAngues,* 996 F.2d 130, 134 (6th Cir. 1993), quoted with approval, the language of *Twin Pines Coal Co. v. US DOL*, 854 F.2d 1212 (10th Cir. 1988): "Even when other causes are themselves independently disabling, '[t]he concurrence of two sufficient disabling medical causes one within the ambit of the Act, and the other not, will in no way prevent a miner from claiming benefits under the Act."

[33] The Court noted the standards adopted by other Circuits, i.e., the "substantial contributing cause" test of *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258 (11th Cir. 1990); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726 (3d Cir. 1990) which it finds places too heavy a burden on the miner and the "at least a contributing cause standard" of *Robinson v. Picklands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990); *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531 (10th Cir. 1989).

CONCLUSIONS

In conclusion, the claimant has established the existence of pneumoconiosis arising out of his coal mine employment and that he now suffers from a total respiratory disability. The claimant has not established that his total disability is due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER[34]

It is ordered that the claim of Mr. Harvey D. Farley for benefits under the Black Lung Benefits Act is hereby DENIED.

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RICHARD A. MORGAN

Administrative Law Judge

NOTICE OF APPEAL RIGHTS (**Effective Jan. 19, 2001**): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[35]

[34] § 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

[35] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.